COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-510

ROBERT CASEY & others[1]

vs.

LACOURT FAMILY, LLC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, LaCourt Family, LLC (LaCourt), appeals from the entry of summary judgment by a judge of the Land Court concluding that LaCourt's predecessor had abandoned its express rights over a ten foot wide private way known as Drummond Place in the city of Cambridge (city), and from the order denying LaCourt's motion for reconsideration. LaCourt contends that this case rises and falls on one factual issue: whether there was a gate in the fence between the LaCourt property and Drummond Place. If a gate existed, LaCourt argues, summary judgment is inappropriate. For the reasons that follow, we affirm.

Background. We first recite the pertinent facts from the summary judgment record, describing the locations, properties,

[1] Francis Casey and Helen Casey.

and parties involved, and identifying the various (and at times divergent) evidence proffered by both parties. Drummond Place is ten feet wide at its intersection with the public way, Norris Street, and runs perpendicular to Norris Street for 100 feet, and then widens to twenty feet for an additional forty feet, before terminating at a dead end. Drummond Place provides the sole access to two separate lots known as One Drummond Place and Two Drummond Place, neither of which has a driveway. Viewed from Norris Street, One Drummond Place and Two Drummond Place abut the right side of Drummond Place. One Drummond Place is located approximately midway between Norris Street and the dead end. Forty Norris Street (the LaCourt property) fronts on Norris Street and runs the length of and abuts the left side of Drummond Place. The original deeds to One Drummond Place, Two Drummond Place, and the LaCourt property all contain an express easement over Drummond Place.

From 1902 until 1955, the city built and then operated a school on the LaCourt property. The school building fronts on Norris Street, and, when facing the school, there is a driveway on the left side that provides access to a rear parking lot. Drummond Place abuts the right side of the LaCourt property, and there is no evidence in the record pertaining to the use of Drummond Place during that period.

The Roman Catholic Archdiocese of Boston (Archdiocese) purchased the LaCourt property from the city in June of 1957 and operated a high school there from 1957 to 2009. Sometime between 1957 and 1965 (September of 1961 according to LaCourt), the Archdiocese erected a wrought iron fence along the border of the LaCourt property and Drummond Place, effectively blocking the school's access to Drummond Place. The fence was approximately four feet high and contained no openings. At some point prior to 1970 (June of 1969 according to LaCourt), the Archdiocese replaced the wrought iron fence with an eight to ten foot high chain link fence topped with barbed wire.

In 1958, Francis and Helen Casey (together with their son Robert, the Caseys or the plaintiffs) purchased One Drummond Place. From 1958 until 2004, the Caseys parked their car in a spot directly in front of their home, approximately in the middle of the ten foot wide Drummond Place. They coordinated parking with the owner of Two Drummond Place, who also parked on Drummond Place in tandem at a spot directly in front of the home at Two Drummond Place. Evidence in the summary judgment record compelled the inference that the parked cars would have blocked use of Drummond Place by the Archdiocese or its visitors if, in fact, there had been a gate in the fence allowing access to

Drummond Place from the LaCourt property.[2] The Archdiocese never complained about the Caseys parking on Drummond Place.

The Caseys paid to pave Drummond Place in 1968, and cleared the way of snow after storms. The Archdiocese never contributed to the upkeep of Drummond Place, although it did maintain a light that illuminated the "Drummond Place passageway."[3] In 2004, the Caseys and the owner of Two Drummond Place split the cost to remove a large tree from the wide section of Drummond Place to create two parking spots along the fence separating the LaCourt property from Drummond Place.[4] Thereafter both homeowners parked their cars along the fence.

Francis and Helen Casey's son, Robert, purchased One Drummond Place from them in 2010, but Francis and Helen continue to occupy the first floor apartment. Robert has allowed his

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[2] LaCourt admitted that the Caseys parked on the ten foot wide portion of Drummond Place from 1958 until 2004 and that in doing so, one-half of their vehicle would have been on the Archdiocese's one-half of Drummond Place. LaCourt averred that the Caseys and their neighbors had to park in tandem because "Drummond Place is not wide enough to allow a vehicle to pass by another that is parked on Drummond Place." LaCourt also admitted that from 1958 until 2004, if the Caseys parked on Drummond Place, they parked directly in front of their home.

[3] A letter from an NSTAR employee indicates that the light was for the sole purpose of illuminating Drummond Place, but the basis of his knowledge of the purpose is not apparent from the letter, which was not signed under the penalties of perjury.

[4] We note, as did the motion judge, that there was conflicting evidence whether the Caseys and the owner of Two Drummond Place shared the cost of the tree removal. We agree with the judge that this has no bearing on the outcome of this case.

parents to continue using the parking spot on Drummond Place, and he has parked his car on Norris Street.

LaCourt purchased 40 Norris Street from the Archdiocese in 2010, and on March 16, 2012, the city granted LaCourt a special permit to convert the school into twenty-five residential units and two commercial spaces with twenty-seven parking spaces. A condition of the special permit expressly limits the use of Drummond Place by building occupants and users of 40 Norris Street to emergency vehicles only. By letter dated August 9, 2012, LaCourt informed the Caseys of its intention "to place an emergency gate at the location where Drumm[o]nd Place . . . and the 40 Norris Street Parking lot abut" and instructed them not to park there or LaCourt might be forced to tow their car. Asserting their right to park on Drummond Place and claiming that the Archdiocese had abandoned its easement, the plaintiffs commenced this action.

Discussion. Summary judgment is appropriate where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Community Natl. Bank v. Dawes, 369 Mass. 550, 553 (1976). If the moving party, in its pleadings and supporting documentation pursuant to Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002), asserts the absence of any triable issue, the nonmoving party must respond and make specific allegations sufficient to establish a

genuine issue of material fact. Drakopoulos v. U.S. Bank Natl. Assn., 465 Mass. 775, 777-778 (2013). Bare assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment. O'Rourke v. Hunter, 446 Mass. 814, 821 (2006). See Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974) ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading"). We review the disposition of a motion for summary judgment de novo, Miller v. Cotter, 448 Mass. 671, 676 (2007), and all evidentiary inferences are to be resolved in favor of the party opposing the motion for summary judgment. Nunez v. Carrabba's Italian Grill, Inc., 448 Mass. 170, 174 (2007).

In the present case, the parties first dispute whether there was a gate in the fence anywhere along Drummond Place.[5] The Caseys contend that there never was a gate, but LaCourt contends that there was a twenty foot wide accordion gate, padlocked on top and bottom, in existence when it bought the

[5] The judge found that the summary judgment record, including photographic evidence, established that the gate was not present as of 2010. In its motion for reconsideration, LaCourt explained that "[d]ue to its construction the gate is not visible in the photographs," and detailed the manner in which certain movable rails, obscured in the photographs, could be pushed to the side permitting egress to Drummond Place. LaCourt filed an affidavit from its manager, accompanied by exhibits, in support of its motion. We agree with the judge's finding in his order on LaCourt's motion for reconsideration, that the manager's "knowledge of the properties in question is limited to the approximate period of 2010 . . . to date, so his allegations as to facts prior to 2010 are, as before, mere speculation."

property in 2010.[6] The summary judgment record reflects that LaCourt provided evidence, in the form of (1) its manager's answers to interrogatories and (2) an affidavit from the owner of a construction company, which aver that an accordion gate in the fence existed when LaCourt purchased the property in 2010, and that the accordion gate existed and could be used for vehicular passage in 2012 at the time the fence was removed. Resolving all evidentiary inferences in favor of LaCourt, the record reflects that a gate in the fence existed in 2010 and 2012. LaCourt maintains that the evidence of the gate's existence in 2010 and 2012 raises a genuine dispute of material fact as to whether the Archdiocese intended to abandon the easement, and mandates denial of summary judgment. We disagree.

"Whether there has been an abandonment of an easement is a question of intention to be ascertained from the surrounding circumstances and the conduct of the parties." 107 Manor Avenue

[6] The record reflects inconsistencies in LaCourt's description of the gate in the fence separating the LaCourt property from Drummond Place. Specifically, in its opposition to plaintiffs' motion for preliminary injunction, LaCourt claimed that when it purchased the property in 2010, the fence had an accordion gate. Subsequently, LaCourt, citing a work order dated June 27, 1969, claimed that in June of 1969, the Archdiocese replaced the wrought iron fence with a "14 foot wide, Double Drive Gate." Apparently recognizing that the work order referenced a fence and gate at a different location on the LaCourt property, and not the fence adjacent to Drummond Place, LaCourt abandoned the claim about the fourteen foot wide, double drive gate. Instead, LaCourt claimed that the "chain link fence contained an approximately 20 foot accordion folding gate."

LLC v. Fontanella, 74 Mass. App. Ct. 155, 158 (2009). Abandonment is shown by "acts indicating an intention never again to make use of the easement in question." Ibid., quoting from Sindler v. William M. Bailey Co., 348 Mass. 589, 592 (1965). Nonuse alone, no matter how long, will not extinguish an easement. New York Cent. R.R. v. Swenson, 224 Mass. 88, 92 (1916). However, an extended period of nonuse is a factor to consider in determining whether an easement has been abandoned. To warrant a finding of abandonment, nonuse must be accompanied by "acts by the owner of the dominant estate conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its further existence." First Natl. Bank of Boston v. Konner, 373 Mass. 463, 466-467 (1977) (quotation omitted).

Here, the judge concluded that the summary judgment record demonstrated "the Archdiocese's unambiguous indication of an intent to abandon all rights to use [Drummond Place] for access." Our de novo review of the entire record leads to the same conclusion. The Archdiocese first installed a wrought iron fence, with no breaks in it, separating and blocking access to its property from Drummond Place. Subsequently,[7] it replaced

[7] Accepting LaCourt's statement of materials facts, the Archdiocese erected the wrought iron fence in September of 1961 and replaced it in June of 1969. The Caseys' statement of material facts was less precise, and asserted that the wrought

that fence with a taller fence with barbed wire, further indicating its intent that its property not be accessed by Drummond Place.

The erection of the fence was not the only factor supporting the judge's conclusion of abandonment. Contrast Parlante v. Brooks, 363 Mass. 879, 880 (1973) (unexplained existence of fence along boundary line, standing alone, did not show intention to abandon easement). LaCourt admits that from 1958 to 2004, the Caseys and the owners of Two Drummond Place regularly parked their cars in a manner which effectively blocked the way.[8] Thus, in addition to the fencing, the summary judgment record reflects the prolonged and complete nonuse of the way by the Archdiocese, and acquiescence to the neighbors' use of the way, in a manner that impeded the Archdiocese's access to the way, for more than forty years. The combination of these factors demonstrates the Archdiocese's intent to relinquish the easement. See, e.g., Lund v. Cox, 281 Mass. 484, 492 (1933) (finding of abandonment justified by respondent's nonuse of way for thirty-seven years, obstructions to use of relevant part of way for more than twenty years, and no objection to obstructions nor effort to remove them); Sindler,

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iron fence was erected between 1957 and 1965, and replaced at some point prior to 1969.

[8] The judge reasonably inferred from the spaces shown in the photographic exhibits that vehicles parked in the Archdiocese parking lot also blocked access to the way.

supra at 593 (abandonment of easement found where owner of easement "stood by while the disputed area has been confined to the use of the owners of the locus during the past thirty-five years. It apparently acquiesced in the construction of a high chain link fence which enclosed the disputed area for a few years, and in the subsequent placing of a chain across the entrance to the disputed area to prevent its use by persons other than those working or having business in the factory on the petitioner's premises"); Lasell College v. Leonard, 32 Mass. App. Ct. 383, 390-391 (1992) (owner evidenced intent to abandon rights in easement by nonuse over long period of time, acquiescence in use of disputed portion of way by others over many years, and affirmative act of erecting fence separating property from disputed portion of way).

The summary judgment record does not sustain LaCourt's claim that the existence of the accordion gate in 2010 or 2012, without more, raises a genuine issue of material fact. There was no evidence of when the gate was installed or that the Archdiocese had ever used it. At oral argument, LaCourt further acknowledged that there is no evidence in the summary judgment record that the gate existed prior to 2010. In light of the Caseys' averments that they never observed a gate in the fifty-plus years they lived on and parked on Drummond Place, some specific allegations of when the gate purportedly was installed

or that it appeared to have the same general age appearance as the other portions of the fence was necessary to raise an issue of fact. LaCourt presented no affidavit or other evidence from the Archdiocese or any student, teacher, employee, or neighbor who observed a gate in the fence before 2010. The most detailed evidence describing the alleged gate came in the form of an affidavit from LaCourt's manager in support of LaCourt's motion for reconsideration, filed after the judge had granted summary judgment. The manager averred that in 2012, a padlocked accordion gate existed and that people and, perhaps, a piece of equipment like a Bobcat, could pass through the gate when the padlocks were removed. In addition, the owner of a construction company averred that he used the original gate for vehicular passage in 2012 when he removed it and installed the present gate. However, neither the manager nor the owner can reliably opine in their attestations[9] as to the age of the gate, or describe the gate as having been made from the same materials,

[9] LaCourt's manager further averred that he did not know when the accordion gate was installed, but believed "it has been there since the chain-link fence was erected around 1970." The affiant's "belief" that the gate was installed along with the fence around 1970 lacks any factual basis. See Madsen v. Erwin, 395 Mass. 715, 721 (1985), quoting from Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141, 1146 (3d Cir. 1972) ("Conclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment").

showing the same amount of wear, or otherwise appearing to have been installed at the same time as the fence.

We concur with the judge's determination that the summary judgment record reflects that access to Drummond Place was obstructed for forty years or more. The conclusion that the Archdiocese abandoned its easement over Drummond Place is compelled from the Archdiocese's prolonged lack of use, the maintenance of successive fences blocking access, the blocking of the way by the plaintiffs' parking of their cars on the way, the Archdiocese's failure to object to the plaintiffs' regular parking along the way, and the Archdiocese's lack of contribution to maintaining the way.[10] See 107 Manor Avenue LLC, 74 Mass. App. Ct. at 161, and cases cited (nonuse along with acts making access to way impossible justified finding of

[10] The Archdiocese never contributed to the upkeep of the private way and its maintenance of a light that illuminated Drummond Place is equivocal at best where the pictures reflect that the light is directed to illuminate the parking lot as well. The Archdiocese's sole conduct of paying for the electricity for a single light is insufficient in these circumstances to raise a genuine issue of material fact as to the Archdiocese's intent to ever use Drummond Place.

abandonment).

Judgment affirmed.

Order denying motion for reconsideration affirmed.

By the Court (Wolohojian, Kinder & Neyman, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: August 29, 2016.

[11] The panelists are listed in order of seniority.